Supreme Court, U.S.
FILED
SEP 2
CLERK

No. 99-69

In The

Supreme Court of the United States

JUDITH A. NEMETH, DONALD J. NEMETH and JOHN L. VITALE,

Petitioners,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ANSWERS TO NEW POINTS PRESENTED BY RESPONDENTS

Respondents, without response to the issues raised by petitioners' Petition have sought to raise the following two points in their Answer:

I. PETITIONERS HAVE ALREADY RECEIVED THE RELIEF THEY SOUGHT.

REPLY TO POINT I: Petitioners are gratified that respondents herein credit them with causing the passage of Chapter 96-243, Laws of Fla. (1996) calling for refunds for The *NEMETH* Class.

However, it cannot be said that full relief was afforded. The said refund statute was seriously deficient in the following ways:

1. Insufficient funds were appropriated to make a full refund to all aggrieved taxpayers;

2. No provision or appropriation was made for payment of interest after having raised about $30,000,000.00 about seven years earlier,

3. No provision or appropriation was made for payment of a reasonable attorney fee and

4. An inadequate less-than-one-year window for seeking refunds was afforded, when the-then refund statute called for a three year window of opportunity "after the right to a refund accrues" (meaning statutory right or court decision) without mention of date-of-payment of taxes. (Said statute now affords a five year window of

ANSWERS TO NEW POINTS PRESENTED BY RESPONDENTS – Continued

opportunity, from date of payment, within which to seek refund.)

II. THIS CASE WAS DECIDED SOLELY ON MATTERS OF STATE LAW.

REPLY TO POINT II: It is the height of irony in the instant case, for the State of Florida to argue that "there is no Federal Question Presented" when, via a single facially-invalid tax statute, it has deprived its citizens of money, and due process and in refusing to grant refunds following improper taxation in gross violation of the United States Constitution or to pay interest on the ill-gotten gains.

The Impact fee under challenge was deficient in the following regards (none of which defects are or can be defended by the respondents):

1. Failure to provide a pre-deprivation hearing in order to contest the tax before payment

2. Imposition of a "flat" tax without regard to:

A. Value or price paid of the auto or

B. The degree of "impact" of a small 4-cylinder car compared to an 8-cylinder, heavy gas-guzzler

3. No showing that a car from out-of-state would have an "impact" greater than an auto previously registered in Florida and

4. Credit against the Impact Fee was allowed only for Florida Sales taxes paid, granting a preference to

ANSWERS TO NEW POINTS PRESENTED BY RESPONDENTS – Continued

Florida dealerships, constituting a federally impermissible tax on interstate commerce.

The presence of any one of the aforementioned defects presents a very serious "Federal Question."

The presence herein, however, of *all* of the listed defects gives rise to what can only properly be described as "a facially unconstitutional" statute.

REASON[illegible]FOR GRANTING THE WRIT

Following even the most casual reading of the *McKESSON* and *NEWSWEEK* decisions, we are constrained to conclude that the State of Florida has, again, made the United States Supreme Court an involuntary third level of appeal for its citizens. In each of those cases, the aggrieved taxpayer was consistently denied relief by the state courts and agencies . . . and justice was achieved only after each matter was brought into the federal arena.

Both the *McKesson* and *Newsweek* decisions very plainly and clearly require that states must provide meaningful backward looking relief, (both cases arose in Florida) and both cases hold that states must provide a remedy for improper taxation that is "clear and certain."

Our experience and legal research, however, has shown us that the only thing that is "clear and certain" about the Florida refund process is that the victimized taxpayer "clearly and certainly" will not get a refund.

(Note: Neither of the Nemeths has received a refund. This question was asked by the court below during oral argument and it was answered by undersigned counsel, who responded: "No, Your Honor, they have not.")

(OFFER AND QUESTION: If the respondents can produce a cancelled refund check by the Nemeths, then petitioners are prepared to apologize and make serious concessions herein. But if the respondents cannot

produce any such cancelled check, are the respondents prepared to apologize and offer serious concessions?)

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted. In the alternative, petitioners request this Court to summarily reverse the Florida Supreme Court's decision for further consideration in light of *McKesson Corp v Division of Alcoholic Beverages*, 496 U.S. 18 (1990) and *Newsweek, Inc. v Florida Department of Revenue*, 118 U.S. 904 (1998) and an award of legal fees.

Respectfully submitted,

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